LIM KIAP KHEE

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[FT MISCELLANEOUS APPLICATION NO. CR 54-28-87]
30 OCTOBER 1987

CRIMINAL LAW AND PROCEDURE: *Bail - Applicant's International Passport impounded as a condition to granting bail - Offence charged is CBT - Section 409 of Penal Code - Non-bailable offence - Impounding passport - Whether impounding passport one of conditions of granting bail - Scope of s. 388 of the Criminal Procedure Code.*

CRIMINAL LAW AND PROCEDURE: *Passport - Issued by foreign government - Court decides applicant must surrender passport - Whether it is immaterial applicant is a citizen of this country or passport issued by a foreign government - Question of jurisdiction.*

This was an application by the applicant for an order of the High Court that his international passport be released to him. The Sessions Court Judge earlier had in respect of Arrest Case No. 74-133-87 and at the application of the DPP, *inter alia* ordered that the applicant's passport be impounded.

The question for the High Court to consider was whether the learned Sessions Court Judge was right in law to order the international passport to be impounded in addition to the order of granting the bail.

Held:

[1] The Court has the absolute discretion under s. 388 of the Criminal Procedure Code whether to allow bail or to refuse bail except in cases punishable with death or imprisonment for life. In granting bail, the Court may, in addition to stating the amount of bail and the number of sureties, impose an additional condition requiring the accused person to surrender his passport.

[2] If the Court decides that one of the conditions of bail requires that the accused surrenders his passport it is immaterial whether the accused is a citizen of this country or a foreigner or whether he is holding a Malaysian passport or a passport issued by a foreign government.

[3] However, the order of the Sessions Court Judge impounding the applicant's passport was certainly not one of the conditions of bail and therefore did not fall within the scope of s. 388 of the Criminal Procedure Code.

[Order of Sessions Court Judge impounding applicant's International Passport set aside. Passport ordered to be returned to applicant forthwith.]

Cases referred to:

Public Prosecutor v. Mat Zain [1948-49] MLJ Supp 142
Re K.S. Menon [1946] 12 MLJ 49
Rex v. Genda Singh & Ors. [1950] AIR Alla 525
re Saradamma & Ors. [1965] AIR AP 444
Hazari Lal Gupta v. Rameshwar Prasad & Anor. [1972] AIR SC 484
Government of Malaysia & Ors. v. Loh Wai Kong [1979] 2 MLJ 33

Legislation referred to:
Criminal Procedure Code, s. 388
Criminal Procedure Code [Ind], s. 497, 497(1)
Federal Constitution, art. 8(1)
Penal Code [Ind], ss. 406, 420
Penal Code, s. 409

Other sources referred to:
Archibold Criminal Pleading, Evidence and Practice, 42nd Edn., p. 166
Stroud's, Judicial Dictionary of Words and Phrases, Stroud's 5th Edn.

For the applicant - Manjeet Singh Dhillon; M/s. Lawrence Dhillon & Associates
For the public prosecutor - Tan Hock Chuan, Deputy Public Prosecutor

JUDGMENT

Zakaria Yatim J:

This is an application by notice of motion for an order of the Court that the applicant's international passport be released to him in respect of Arrest Case No. 74-133-87. The application is supported by the affidavit of the applicant. The Public Prosecutor filed an affidavit-in-reply affirmed by the investigating officer in the said arrest case.

The applicant was charged in the Sessions Court on 29 September 1982 with two charges of criminal breach of trust punishable under s. 409 of the Penal Code. The applicant claimed trial to both charges. The Court then fixed the dates of hearing in October 1988.

After the plea was recorded, the question of bail was considered. I have obtained a certified true copy of the record of the proceedings held on 28 September 1982 in respect of this case. According to the record, Mr. Tan Hock Chuan, the Deputy Public Prosecutor told the Court that the applicant was charged with non-bailable offences. He said he had no objection to bail granted to the applicant. He suggested that bail be set at not less than RM400,000. He also asked the Court that the applicant's passports be "impounded". Mr. W.K. Leong, Counsel for the applicant in the Court below, asked the Court to reduce the amount of bail suggested by Mr. Tan. He also asked the Court, for an order that the applicant's passports be returned to him.

After hearing the submissions of both Mr. Tan and Mr. Leong, and learned Sessions Judge made the following order:

> Bail is set at RM300,000 in two sureties.
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> Passports to be **impounded.**
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> (Emphasis used)

At 3.30 p.m. on the same day, both parties appeared before the learned Sessions Judge again. Mr. Leong asked that the restricted passport of the applicant be released to him. Mr. Tan had no objection and the learned Sessions Judge ordered that the restricted passport be released to the applicant. His international passport, however, remained impounded.

The question for the Court to consider in the present application is whether the learned Sessions Judge was right in law in ordering the international passport to be impounded in addition to the order of granting the bail.

With regard to bail, it is clear that the relevant provision of the law is s. 388 of the Criminal Procedure Code since the applicant was charged with non-bailable offences. In non-bailable cases bail is at the discretion of the Court and in exercising its discretion the Court must

consider the gravity of the crime. *Public Prosecutor v. Mat Zain* [1948-49] MLJ Supp 142. Indeed under the section, a judge has absolute discretion in granting bail. The discretion must, however, be exercised judicially. *Re K.S. Menon* [1946] 12 MLJ 49. In the instant case the learned Deputy had told the Sessions Court that he had no objection to bail being granted to the applicant. In the circumstances all the Court had to do was to set the amount of bail and the number of sureties, which was done in this case.

The question that arises here is whether under s. 388 the Court has the power to impose conditions when granting bail. There appears to be no decision by the Courts in this country on this point. It is useful to look at the decisions of the Courts in India since s. 388 is almost identical with s. 497 of the Indian Criminal Procedure Code of 1890. Although the 1890 Code had been replaced by a new Code in 1973, decisions of the Indian Courts on s. 497 of the 1890 Code would be persuasive authorities in this country. Section 497(1) of the 1890 Code is reproduced below:

> 497(1) When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
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> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

In India, under s. 497, the Court could impose conditions other than the fixing of bail for the attendance of the accused. In *Rex v. Genda Singh & Ors.* [1950] AIR Alla 525. Raghubar Dayal J said,

> Conditions were imposed in orders granting bail in certain cases of non-bailable offences ... Under s. 497 Criminal Procedure Code, which provides for bail in non-bailable cases, it is discretionary for the Court to grant bail. In certain circumstances mentioned in sub s. (1) bail is not to be granted and in certain circumstances mentioned in sub s. (1) bail has to be granted by the Court. When discretion is given to the Court to refuse bail or to grant it, that discretion itself implies a discretion to grant bail subject to certain conditions ...

The conditions imposed by the Court, must, however be reasonable. In *re Saradamma & Ors.* [1965] AIR AP 444, it was held that an order imposing a condition that the accused should confine their movements to the municipal limits of the town as long as the case was pending and report themselves twice a day to the police station, was not illegal. In that case, Venkatesam J, at p. 446 said,

> Thus in the case of non-bailable offences ... a discretion is conferred on the Court whether to enlarge or not to enlarge the accused on bail. When the Court is thus conferred a discretion and in the exercise of that discretion it considers necessary to impose certain conditions, can it be said that those conditions are illegal? ... Having regard to this well established line of authority I hold that in the case of non-bailable offences, a Court may impose conditions other than the fixing of the bail for the attendance of the accused, and such a condition is not illegal.

In *Hazari Lal Gupta v. Rameshwar Prasad & Anor.* [1972] AIR SC 484, the Indian Supreme Court held, *inter alia*, that the High Court while granting bail to an accused person, an Indian national residing in a foreign country, can restrict his departure from India by requiring him to surrender his passport. In that case the appellant had been living and doing business in the United Kingdom since 1963. He was dealing in the business of carpets imported from

India. The appellant withheld payments being the price of carpets supplied to him. For several years the appellant failed to pay the money. When he arrived in India in 1970, a report was lodged against him. He was arrested for offences under s. 406 and 420 of the Indian Penal Code. Bail was refused at first but when the matter went up to the High Court, the High Court ordered that there would be no harm if the appellant was further ordered to surrender his passport to the Magistrate. The appellant was released on bail after furnishing the surety to the tune of RM10,000 and after surrendering his passport to the Magistrate. Ray J, in delivering the judgment of the Supreme Court said, at p. 486, in the following words:

> On behalf of the appellant it was said that ss. 496, 497 and 498 of the Criminal Procedure Code in relation to bail did not confer any power on the Court when granting bail to restrict the departure of the appellant from India by requiring the appellant to surrender the passport. Sections 496, 497 and 498 of the Criminal Procedure Code are not exhaustive of powers of the Court in regard to terms and conditions of bail particularly when the High Court under s. 561-A of the Criminal Procedure Code deals with cases of this type. **The apprehension of the appellant jumping bail could not be brushed aside. If the appellant wanted to retain the passport the Court might not have granted the appellant any bail.** Again, the reduction of the surety was made in order to enable the appellant to be enlarged on bail. The reduction of surety was also on the consideration that the appellant would not leave India.
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> (emphasis supplied)

Apart from India, the position in England is also the same. In England, a condition of bail sometimes imposed is that the defendant surrenders his passport. As this is a device to prevent the defendant from absconding abroad it should be accompanied by a post-release condition stipulating that the defendant shall not leave Great Britain during the period of bail. *Archibold Criminal Pleading, Evidence and Practice,* 42nd Edn., p. 166.

Finally, reference should be made to a *dictum* by Suffian LP in *Government of Malaysia & Ors. v. Loh Wai Kong* [1979] 2 MLJ 33. In delivering the judgment of the Federal Court, the Lord President said,

> On 2 August 1976, he was charged in Court in Ipoh with criminal offences. His passport was surrendered to Court as a condition of bail ... In our judgment ... Mr. Jag-Jit Singh was ... correct in saying that in certain circumstances the Government has to stop a citizen (or indeed even a non-citizen) from leaving: certainly when, as in this case, there is a criminal charge pending against him.

It is clear from the authorities cited above, in non-bailable offences, the Court has the absolute discretion under s. 388 whether to allow bail or to refuse bail except in cases punishable with death or imprisonment for life. In granting bail, the Court may, in addition to stating the amount of bail and the number of sureties, impose an additional condition requiring the accused person to surrender his passport. If he complies with these conditions then he is released on bail. If he fails to comply with any of these conditions then he is kept in remand until his trial. When the Court lays down the conditions for bail, it is entirely left to the accused whether to comply with the conditions or not. The choice is entirely his. If he does not want to surrender his passport then he opts to remain in custody.

Counsel for the applicant, Mr. Manjeet Singh Dhillon submitted that the international passport impounded by the Court below is a Singapore passport issued by the government of the Republic of Singapore. In my opinion, if the Court decides that one of the conditions of bail requires that the accused surrenders his passport, it is immaterial whether the accused is a citizen of this country or a foreigner or whether he is holding a Malaysian passport or a

passport issued by a foreign government. Before our Court, no one is to be treated differently. Under the Federal Constitution all persons are equal before the law and entitled to equal protection of the law. (Article 8(1)).

The question for the Court to consider now is whether the order of the Court below impounding the applicant's passport forms one of the conditions of bail. In order to answer this question it is necessary to examine the work "impound". According to the *Oxford English Dictionary* the work "impound" means "to seize or secure by legal right; to take legal or formal possession of (a document or the like) to be held in custody of the law." *Stroud's Judicial Dictionary of Words and Phrases*, 5th Edn. states, "A document is impounded when it is ordered by a Court to be kept in the custody of its officer." It is clear from these definitions when a document is impounded it is ordered or compelled by the Court to be kept by its officer and the Court makes the order under the authority of the law.

In the instant case, the Court ordered that the passport be impounded. This was certainly not one of the conditions of bail. Therefore the order made by the Court below in respect of the passport did not fall within the scope of s. 388 of the Criminal Procedure Code.

The question now is whether the Court below had the authority to impound the passport under any other law. The only relevant law is the Malaysian Passports Act 1966 (Revised - 1974). But this Act does not contain any provision empowering the Court or the Government to impound a passport.

In the absence of any law empowering the Court below to impound the applicant's passport the order made by the learned Sessions Judge was not a valid order. Indeed such an order amounts to punishing the applicant without the authority of the law.

I accordingly set aside the order of the learned Sessions Judge with regard to the impounding of the applicant's passport and order that the passport be returned to the applicant forthwith.

Also found at [1987] 2 CLJ 442